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Redstar X., "An Exegesis on the Ideology of Ideologies in Law" 1994 *Zimbabwe Law Review* Vol. 11.

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A CONTRIBUTION TO THE UNDERSTANDING OF RIGHT

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INTRODUCTION

The foremost issue that confronts contemporary legal jurisprudence is that of rights and yet paradoxically, modern legal discourse has failed to grasp the normative essence of right. This essay is concerned with one fundamental inquiry of how we can understand rights and the relationship between right and legality. From whence does legality obtain its normative coercive bindingness?

SOME PERFUNCTORY MATTERS

A discussion of rights is intrinsically linked to the understanding of law. This is not to circumvent the issue. Rather, it is a starting point and we shall come back to the issue of: what is right? This is a critical question since man is born in law, must lead a life governed by law and his after life is governed by law. Law is not an invention of the legal theorist. It is given and manifests itself as a regime of moral regulation.

Theory's indispensable role is to give an independent and coherent justification to the above questions. Any theory that seeks to give a coherent account must as of necessity involve principles which can be abstracted from conditions which necessarily influence their practical application.¹ Abstraction should not be equated with idealization. Rather it is simply a process of detaching certain claims from others. Abstract principles are therefore relevant for reasoning that has broad scope.

We begin with an allusion as to what it is to give an account. A proper theoretical of anything is as of necessity circular. There is something to the old adage; everything is what it is. One begins by analyzing phenomena, works through the properties of that phenomena and concludes whether the properties harmoniously fit into the whole. In formalist terms, such a justificatory enterprise is called the concept of the articulated whole. In as much as law is given, you and I as human beings, constitute a world which is made up of thoughts. This gives rise to the possibility of law being intelligible on its own account as law, a point that has largely been ignored by contemporary legal theorists.

CONTEMPORARY JURISPRUDENCE

We begin with an accusation. Rightwing and leftwing legal theorists have consistently ascribed right to certain political, cultural and economic systems. Thus today we have the subsuming of law under an endless list of other scholarly disciplines as if law is incapable of being understood on its own; Law and economics; law and culture; feminism and law, law and politics; law and sociology and so on.

This implied holistic approach is supposedly reflective of the democratic nature of scholarship in which unrelated scholarly disciplines are understood in terms of each other.²

1 Immanuel Kant, "On the Common Saying: This May Be True In Theory, But Does Not Apply In Practise," in *Kant's Political Writings*, 61 (H. Reiss, ed. 1970).

2 See Dennis T. Mandudzo, "A Theory of Delict," 1993, *Zimbabwe Law Review*.

Such jurisprudential explanations of rights, we shall argue, have been largely responsible for unjust policies. Of particular poignance is Anglo Saxon utilitarian jurisprudence and Marxist jurisprudence.

The utilitarian version of Anglo Saxon jurisprudence has throughout its history given a normative foundation of political repression.³ Championing the maximal happiness of the greatest number or the more modern approach of "balancing" rights has meant that repressive colonial legislation can be legitimised and that tyranny can be justified in the interests of economic well being. Who, on this side of the world would doubt the pervasive influence that, say, Austinian or Bethamite legal theory has had on colonial and post colonial regimes. How else could one explain the extra judicial functions of colonial administrators who would with impunity act as judge, prosecutor and executioner. During the colonial era, entire tribes could be wiped out in the "interests of civilization."

The Marxist often quoted cry about the withering away of the state and the anarchist posturing about what amounts to a utopian hedonistic garden of eden have been proven to be a historical falsehood. Cruel totalitarian states whose sole means of survival was an omnipotent state while at the same time hypocritically calling for the withering away of the state have fallen by the wayside. Today the vast masses of our long suffering peoples are being asked to surrender their rights on the basis that rights are culturally alien and that rights hinder the furtherance of their material wellbeing. Sadly, such wellbeing has not been forthcoming.

With this in mind we must view the law and the syndrome that currently pervade today's law books and journals with scepticism. Contemporary rights discourse has tended to be all inclusive. Properties that properly belong to the political and economic domain, such as gender "development" are now championed on the banner of rights. This is the point of departure in this essay. Right, and consequently obligation, which are articulated in law and through law can only make sense when viewed without reference to other fields of enquiry as is characteristic of contemporary scholarship. Right and law occupy a separate province from scholarly disciplines. Right we shall see, knows no tribe, culture, race, gender or economic status but is universal in nature.

The givenness of right makes it an idea of reason, that is, an exhibition of intelligible thought. It follows that right is *a priori*. It is not subject to experience. What therefore animates this idea of right? The answer lies in man's capacity for free and purposive agency. The justification for right therefore lies in the very nature of human action/freedom, an idea to which we now turn.

Free will

Free will is free and purposive agency so construed. Purposiveness is the use of freedom inherent in choice. Agency has two normative dimensions: (a) The capacity for choice, that is the capacity which is given to all rational beings to have an object as a preference. The free agent is able to reflect on the content of any particular purpose and at the same time is able to abstract and choose one purpose in favour of another. (b) The capacity of the will, being the capacity for desire, is as the determining ground of choice. The object must be distinguished from the choice. Choice is constitutive of the external manifestation of an

3 This of course does not mean all English legal theorists are utilitarianists. Notable exceptions include John Locke and his modern day expositor, the American, John Rawls.

agent's inward purpose. Freedom in the negative sense involves not being determined by inclination or impulse, while in the positive sense it denotes the capacity of the will (practical reason) to be itself practical. Practical reason refers to anything that is possible in the exercise of free and purposive agency, that is the will is free.⁴

Central to the operation of free will is the role of mental representation. The moral agent is able to adopt and discard one choice in favour of another and bring an object of desire into reality. This in sum, represents the capacity to abstract and reflect upon the content of mental representation. Once an agent makes his choice, he abides by it.⁵ An agent's action is rational in as far as it is not determined by circumstance or inclination *arbitrium brutum*, (animal will), but by the universality inherent in choice as determined by free will (*arbitrium liberum*). An action is moral if it is done under duty. In cases of conflict we can distinguish deeds that are right or wrong obligations and desire.⁶ Purposiveness accordingly connotes the use of freedom that is presupposed in choice.⁷

Correlatively, the freedom which you and I have, and which makes us equal, is not lawless hedonism to do what we want at any given moment; a kind of an anarchical empirical licence, but rather the capacity at any given moment as rational beings to "transcend the immediacy of inclination and thus engage in moral reflection and choice".⁸ The normative basis of agency is not empirical, but transcendental, that is, reason as a universal law.

Free will is therefore universal in character; agents pursue their chosen ends whatever they may be and wherever they may be situate. Professor Weinrib elucidates;

Practical reason is the determining ground of agency so construed. In as much as only a rational being can abstract, agency is rationality as it operates to change the world. Particular acts are most expressive of the agent's rationality when they are determined not by the givenness of inclination and circumstance, but by the universality inherent in the form of choice. At a minimum this universality requires that the principle on which a purposive being chooses to act be capable of functioning as a principle valid for all purposive beings, whatever their inclinations or circumstances and whatever the specific purposes that might promote their well being. In this conception of normativeness, particular choices live up to the formal stand point that characterizes the purposive activity of free agents. Normativeness is thus the expression of practical reason in its most literal sense: as a unity of reason and practice.⁹

Practical reason is hence synonymous with the unity of agency and the will. The agent's capacity to abstract from particular ends leads the possibility of ordering interactions between free and purposive agents without making judgement on the virtuousness of their chosen purposes.¹⁰

Out of the above proposition comes Kant's famous categorical imperative "Act upon a maxim that can also hold as a universal law".¹¹ The categorical imperative therefore provides a normative stand point for determining right and duty, which concepts are only peculiar

4 Immanuel Kant, *The Metaphysics of Morals*, 42-43 (Mary Gregor, trans, 1991).

5 See Ernest J. Weinrib, "Law as Kantian Idea of Reason," 87, *Columbia Law Review* 481-482 (1987).

6 Immanuel Kant, *Kant's Political Writings*, 18 (Hans Reiss, trans. 1970).

7 Ernest J. Weinrib, "The Jurisprudence of Legal Formalism," p 12-13.

8 Owen Fiss, "CODA," 38 *University of Toronto Law Journal* 229, 234 (1988).

9 Ernest J. Weinrib, "The Jurisprudence of Legal Formalism", AALS Meetings Paper, 13, (1992).

10 Weinrib, *The Idea of Private Law*.

11 Kant, *The Metaphysics of Morals*, p 51.

to human beings. Conduct stemming from animal will is not normatively basic. Right therefore involves drawing out the juridical implications of willing, as the externalisation of the agent's inward purpose.¹² Put differently, right is constitutive of the sum total of norms under which my choice can be conjoined with that of another in accordance with a universal principle of freedom. As such, it is reflective of free and purposive agency. Thus the gravamen behind the idea of right is the harmonization of wills that are free.

The idea of right therefore excludes wishing whether benevolent or malevolent and with it, wellbeing. A wish is practical in as far as it involves mental representation and can thus be discarded in favour of another but it has no external effect.¹³ In the same vein, need, which is internal to one agent, has no bilateral external existence and as such cannot legally oblige another, except ethically. The harmonisation of free wills is not concerned with the specific purpose of the agent because what motivates him remains internal to him. My right cannot be harmonised by my choice to another's need/wish but by my choice and another's choice alone.

Choice, not the content of choice is the relevant signpost. Thus for example, the law of contract is not concerned with the motivating factors inducing the contract, but rather with the judicial meeting of the minds, that is, the formal meeting of the wills of abstractly equal parties. Freedom therefore manifests itself juridically in rights others are morally bound not to violate. The conception of men without personality is normatively impossible. *A fortiori*, agents are born with inert right, which refers the right to one's own humanity as a self determining autonomous agent, through which we can extrapolate the rights that can determine what is mine or yours.

The scheme outlined above which articulates and brackets right as the juridical manifestation of free will does not accommodate welfare. Now, we must at this point emphasise that we are not denying the significance of welfare. An agent, as a free being, exercises his free will in a given environment. Purposive agency takes place under empirical conditions, which may include "the working of one's will through the physical organism of the body, the sentience of the organism, the presence of satisfactions that motivate action and so on."¹⁴ The point is that welfare is not normatively basic as it is political. Welfare is only relevant in so far as it is crystallised in the holding of a right, that is, it is secondary to the idea of right. Right is not concerned with whether an act increases or decreases welfare, but with whether an act is harmonious with the choice of another in accordance with practical reason.

While the activity of acquiring or enhancing or using one's property is driven by one's needs and interests, the idea of property derives from abstract right rather than from welfare.¹⁵ Welfare is political in the sense that it deals with the amelioration of conditions that adversely affect the agent's well being and not with how the agent exercises his freedom. This accords the priority of right over good a normative significance. Rights are an end in themselves, while welfare is a means to an end. Juridically, there is no obligation to satisfy another's want.

The sphere of right is distinct from ethics because law is concerned with the legality of concrete human action, not the moral intention of the agent. Ethics are only relevant in as

12 Ernest J. Weinrib, "Corrective Justice", 77 *Iowa Law Review* 422-423 (1992).

13 Weinrib, "Law as A Kantian Idea of Reason", p 479.

14 Weinrib, "The Jurisprudence of Legal Formalism" p 15.

15 Weinrib, *The Idea of Private Law* p.172 - 173.

far as law allows the agent to satisfy his inner moral fulfilment. If we were to start with welfare or experience, we would never get the correct sense of obligation. One can understand right without reference to virtue, but never vice versa. Since right is an end that is owed to persons as persons, it cannot be contingent upon another's subjective predilection. [To equate right with the good would amount to a coincidence of Panglossian proportions].

We have seen how the striking feature of right is its normativity; the agent's particular aspects such as character and overall situation are irrelevant. The virtuousness or wishes of the parties are irrelevant to the bindingness of a legal obligation. Put simply, right is the moral capacity for putting obligations on others. Right is therefore intertwined with the need to use coercion, that is, to conform with the choice of others.

THE GENERAL WILL AND WHAT IS YOURS OR MINE

Recall and consider here that free agency gives the moral basis for private property; the latter being a juridical reflex of the former. Anything that is incapable of free agency is subject to acquisition in accordance and in conformity with the idea of right. The possibility of right coheres with the principle of property. There is a contrast between freedom and objects that are not free. It follows there is nothing in the principle of universal right to prevent the requisition and usage of things that are not free.

To conclusively establish what is mine or yours we require conditions that secure right. Public right or the general will is therefore a derivative of free will in the sense that right obtains to the external interactions of wills that are free. Practical reason therefore becomes the general/universal will.¹⁶ The general will is therefore practical reason as it functions in conformity to the idea of right by coercing wills that are free into lawful freedom. Taken on its own, coercion is a hinderance to freedom, but its use is consistent with freedom when it is deployed to prevent hinderance to freedom.¹⁷

Without the general will, the rights that you and I have can only be provisional. While a state of nature is not necessarily a state of injustice, it is a state devoid of justice because when our rights are in dispute there is no competent authority to render an impartial binding verdict.¹⁸ The state therefore is the final conclusion of the idea of right; it is the ultimate expression of the freedom so called. With its establishment, you and I move from lawless freedom into a regime of reciprocal coerced lawful freedom.

Contrary to anarchoist and Marxist arguments which view the state as an unnecessary evil or as immoral, the state is central to the idea of freedom, beginning with freedom's embryonic state in free will to its maturation in a normative regime of public law. Because we are all born with inert right, there is a moral duty for us to enter into a lawful state, otherwise one will be forced to enter into freedom, it being an idea of practical reason. You can only be free in so far as your freedom does not impinge on that of other moral actors.

It will be recalled that private right is the restriction of an agent's freedom so that it conforms with the freedom of other actors. Public right, that is, the state, makes this constant harmonious relationship possible. Accordingly the civil state is a relationship among free and equal persons who are subjected to coercive laws, while at the same time retaining

16 See Weinrib, *The Idea of Private Law* p 133.

17 Kant, *The Metaphysics of Morals* p 57.

18 Kant, *The Metaphysics of Morals*, p 123.

their freedom in relation to others. Such a requirement is an *a priori* postulated of pure reason. The civil state is based on three principles:

- a) The freedom of everyone in society as a moral person.
- b) The equality of all moral persons.
- c) The autonomy of every individual as a citizen.¹⁹

The equality spoken of is not equality of possessions or intellect, but equality before the law. Conceived from the stand point of right, the state should not be perceived as a narrow defence of private interests, but rather as the supreme goal of universal justice. A state that secures right is not based on logic or experience but on universal reason as an *a priori* principle. We enter into the state in order to receive our freedom secure and undiminished. Accordingly the function of a rightful state is not the defense of narrow class interests, but to secure everyone's freedom. Under the doctrine of right, everyone is treated equally irrespective of one's station in life; the shanty town dweller or the captain of industry.

We have seen that the general will is the rational and absolute resolve of wills that are free. There must be obedience to coercive laws that guarantee the freedom you and I have and what is mine or yours. The next issue to be addressed is; from whence does the general will obtain its practical aspect i.e. how do we move from the state of nature to a lawful state? The answer lies in the hypothetical postulate of the original contract.

THE ORIGINAL CONTRACT

What is it that makes men enter into freedom? Reason as a universal transcendental principle! The original contract is a contract of a unique nature. It is introduced in order to provide rational account of how people move from provisional enjoyment of rights into a lawful civil society under which what is mine or yours is securely protected.

Public reason is what allows the conception and postulation of original position. Unlike the Rawlsian conception,²⁰ the parties to the original contract need not be under a veil of ignorance. The veil of ignorance is a restatement of the obvious and may well be suited to a political conception of justice, rather than a metaphysical understanding of how we enter into a rightful state.

Public reason has no dictatorial authority, its resolution is simply an agreement of free beings.²¹ In contradistinction, private reason is what avails an agent when he is under a relation of command and obedience, for example, a soldier, or while in the pursuit of self interest.²² Public reason, or in simpler terms, intellectual freedom, is the key to the understanding of right, because right, as a construct of thought, cannot be experienced before it is thought out. Public reason therefore connotes discussion without external coercion. Conceived from the standpoint of public reason, the original position becomes the only matrix within which a plurality of potentially reasoning beings can constitute the

19 Kank, "On the Common Saying," p 73-74.

20 John Rawls, *A Theory of Justice*, Belkap Press, 1971 and John Rawls, *Political Liberalism*, Columbia University Press, 1993.

21 See Onora O'Neill, "Vindicating Reason," in Paul Gruyer (ed) *The Cambridge Companion to Kant*, 1992 at p 291-293.

22 For a discussion of the distinction between public and private reason see D. T. Mandudzo; "The Philosophy of Public Reason" (9-10), *Zimbabwe Law Review*, p 53-55 (1991-1992) Vol. 9.

full authority of reason and so be able to debate without internal restrictions as to what a just civil constitution ought to be.²³

The original position/contract is not an assembly of persons actual or possible which would reduce the contract to a heuristic device. Nor is it an aggregation of free wills since self interest would cloud the debate on how we enter into freedom. Nor do persons enter into it because of men's warlike or savage nature, that is, it must not be coerced. It does not arise out of the necessity to contain passion/vengeance. The original contract is not a fact of history, so that the principles derived therefrom are not subject to historical empirical proof of its existence or an investigation of how persons enter into a lawful state.

The original contract is merely a construction of reason. *Qua* reason the original position is a contract between free selves. Despite being hypothetical, and to that extent it cannot bind, as an idea of reason par excellence, the original position obtains a normative significance. It has undoubted practical reality in that it "obliges every legislator to frame his laws in such a way that they could have been produced by the united will of the whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had consented within the general will."²⁴

So seen, the original position becomes a representation of the realisation of freedom that all rational persons strive for. This is why law and the state are non historical. If we were to imagine for a moment that there was no state and law and enter into a Rawlsian veil of ignorance we would still come up with law and the state as postulates of the original position. It therefore becomes a kind of a categorical imperative; if you want to secure lawful freedom, enter into the original position. In short, in the original position man enters into freedom so construed. Under the original position, lawful freedom becomes the attribute of obeying no laws other than those to which an agent has given his consent under the general will; civil equality is equal treatment before the law for all citizens despite their differences in wealth, moral or social standing; civil independence being the right to be one's own person and not be to be under the choice of others. Under the original position individuals can pursue their own brand of happiness, so long as those pursuits do not violate the freedom of others.²⁵ The subjection to a lawful regime coheres with the affirmation of one's status as a free being.

PRACTICALITY OF RIGHT AS AN IDEA OF REASON

Free will has explained why plant and animal species such as dogs and trees for example cannot have rights outside those that man chooses to give them. Only man has free will and is thus capable of acting in accordance with rational principles. This does not mean that he always does so, for this would render the idea of right irrelevant. We have concepts like duty and obligation because it is man alone who can be obliged by the categorical imperative.

The volition of the idea of right as an aspect of free will brings the idea adjudication into high relief. The maturation of free will into public law yields to an impartial arbiter of rights; the court. As the exemplar of practical reason the court assumes a non political character in its determination of right which is presupposed in free will. The actor's wrong

23 See Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy*, 1989, at p 208-209.

24 See E.J Weinrib, "Law as a Kantian Idea of Reason," p 479 quoting Kant.

25 See Kant, *The Metaphysics of Morals*, p 125.

is not directed to the world at large but to a particular plaintiff. Since neither of the agents has the right to unilaterally determine between two conflicting wills, recourse is had to a third party who is external to both.

As such, the arbitrator's role consists of rendering public the categories of property, contract and wrong which are implied by the concept of right. In so doing, these principles must be openly declared and publicly acknowledged i.e. the court does not only interpret the interaction of free wills but makes public such interaction. The role of public law is not only coercive but interpretive, prospective and deterrent. "Since the vindication of right includes the prevention or reversal of violations of right, the freedom of all is immediately joined with a reciprocal universal coercion".²⁶

As justice ensouled the role of the judge is simply to determine the rights of the parties and not social considerations. The court's role is simply to actualise right in public law. The external nature of right makes it necessary that law be certain and determinate. Extraneous factors such as loss spreading and welfare are ignored because they introduce indeterminacy and as we have seen rights refer to determinate ends and not means to an end. The eminent Kantian Legal scholar, Professor, Weinrib, elegantly posits that;

political authority is a conceptional necessity based upon the interaction of free wills. Since right is the foundation and not the reflection of political legitimacy, the ground of law is not located in the state but in the relationship of free beings determinable by practical reason²⁷

CONCLUSION

It is not from politics or economics that you and I obtain our rights, but rather from the rationality inherent and presupposed in free choice. We have seen how right gives law its normative force. Right is the marrow of legality so to speak. As Kant long noted, without the concept of right, law would be dull and brainless; it would lack internal intelligibility.²⁸ Right therefore is the signpost that animates juridical relationships. This obviously goes above the brooding coercive emptiness of positivism and the pain of utilitarianism.

In what has been aptly described as an unjustly neglected article, Michael Oakeshott, over half a century ago, observed the confusion that pervaded legal scholarship. Having examined the competing claims of historical, political and economic legal theorists, he pointed out that philosophical jurisprudence could not simply accede to the conclusions of special disciplines. Rather, it must state what we already know about law and then work backwards through those presuppositions of this knowledge in order to gain a fuller understanding. It would appear that the passage of time has failed to diminish the pertinence of his observations. The variegation of contemporary legal scholarship is not surprising. Faced with a social world of acute disparities in wealth and competing ideologies on the amelioration of poverty, legal scholarship has succumbed to the demands of political ideologies. If we are to conquer unjust polity, it is imperative that legal scholarship retains its erstwhile philosophical inquiry.

In contradistinction to the various legal schools which treat Kantianism pejoratively or with outright hostility, Kantianism treats right as right and thereby asserts its normative

26 See E. J. Weinrib, "Law as Kantian Idea of Reason" p 498, and generally at pp 496-500 on the role of adjudication.

27 *Ibid.*, at p 508.

28 See E. J. Weinrib, *Ibid.*, at p 472.

significance to individual freedoms. By this short contribution you and I have attempted to restate and elucidate the normative foundation of right as understood by Kant and consequently what determines what is mine or yours. Idea of reason is what characterises the Kantian treatment of right.



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